including detailed engineering records and drawings of the same, and the ability of the new entrant physically to inspect and verify the location, availability, and condition of the venues it seeks to use.

III. THE COMMISSION SHOULD DECLARE THAT ANY MULTIPLE TENANT ENVIRONMENT FACILITIES OWNED OR CONTROLLED BY AN INCUMBENT LEC ARE PART OF THE LOOP.

Although AT&T intends to deploy its own facilities wherever possible, it likely will encounter many situations in which it must rely on the unbundling requirements of sections 251 and 252 to obtain access to the multiple tenant environment facilities owned or controlled by incumbent LECs. As described above, a new entrant generally does not enjoy the same right to obtain leased space within a building as does an incumbent LEC, and thus frequently cannot deploy its own facilities in multiple tenant environments. Because of this fundamental competitive asymmetry, a new entrant needs unbundled access to all facilities owned or controlled by the incumbent LECs.

Indeed, in AT&T's experience, it has served roughly 80 percent of its high-volume commercial customers initially through incumbent LEC access channel terminations. AT&T then transfers those customers to AT&T loops at a later date when (and if) it has obtained the necessary building access and won enough business in the building to justify a full build-out. Furthermore, due to physical limitations, capacity restraints, or other impediments, even section 224 may not provide a new entrant with sufficient access to allow it to provide service on a competitive basis. In such a case, the new entrant will be entirely dependent on the incumbent LEC's network for the foreseeable future.

AT&T's specific engineering and access needs under sections 251 and 252 of the 1996 Act have been described at length in its *UNE Remand Proceeding* Comments and

Reply Comments, and thus are only summarized here.[24] In general, the comments filed by new entrants in that proceeding demonstrate that access to multiple tenant environment facilities owned or controlled by the incumbent LECs is essential if loop unbundling is to create the competitive environment envisioned by Congress. Thus, as the *UNE Remand Proceeding* record confirms, incumbent LECs should be required to provide access to all of the equipment, facilities, and space that they own or control, right up to the privately owned wiring at a customer premise. These facilities could include, *inter alia*, the NID, riser cable and other wiring, horizontal distribution, multiplexing equipment, junction and utility boxes, and terminating equipment (*e.g.*, terminal blocks, smart jacks, and channel banks). In addition, as in the case of access under section 224, access under sections 251 and 252 must encompass ingress and egress for the purpose of establishing and maintaining connections between the new entrant's own facilities and those of the incumbent LEC.

The Commission also seeks comment "from a technical standpoint, on whether sharing of wire may lead to problems due to insufficient power or electromagnetic incompatibility." *Notice*, ¶ 51. AT&T has addressed these issues at length in the Commission's docket concerning advanced service offerings, and thus incorporates by reference its comments in that proceeding.[25] In general, the record in that proceeding demonstrates that the provision of telecommunications services can produce

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[24] AT&T UNE Remand Comments at 59-86; AT&T UNE Remand Reply Comments at 73-90.

[25] Comments of AT&T Corp. at 57-64, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 (filed Sept. 25, 1998); Reply Comments of AT&T Corp. at 67-73, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 (filed Oct. 16, 1998).

electromagnetic interference, and that spectrum management standards therefore should be established.[26] These standards, however, should be developed through industry fora, not through unilateral incumbent LEC action.[27]

IV. THE COMMISSION SHOULD PROHIBIT INCUMBENT LECS FROM ENTERING INTO OR ENFORCING EXCLUSIVE SERVICE AGREEMENTS WITH BUILDING OWNERS.

The Commission seeks comment on whether it "should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with building owners." *Notice*, ¶ 64. The short answer is that to prevent incumbent LECs from locking up multiple tenant environment buildings before competition can develop, the Commission should, at least for now, prohibit them from entering into exclusive service arrangements with building owners.

The Commission has undoubted authority under section 201(b) of the Act to prohibit dominant telecommunications carriers (*i.e.*, the incumbent LECs) from entering into exclusive contracts with building owners for the provision of service that necessarily and inseparably includes interstate exchange access service.[28] Exclusive contracts by incumbent LECs perpetuate the very "barriers to facilities-based competition" that the

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[26] *See, e.g.*, Comments of AT&T Corp. at 57-64, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 (filed Sept. 25, 1998).

[27] *See, e.g.*, *id.*

[28] Section 201(b) expressly authorizes the Commission to regulate "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service," to ensure that such practices are "just and reasonable." As the D.C. Circuit recently held, the Commission thus has undoubted power to regulate the contractual or other arrangements between common carriers and non-Commission regulated entities, such as building owners. *See Cable & Wireless* v. *FCC*, 166 F.3d 1224, 1230-32 (D.C. Cir. 1999).

1996 Act was designed to eliminate. *Notice*, ¶ 19. Indeed, by its terms, section 224 is designed to tear down such barriers to competition by guaranteeing "nondiscriminatory" physical "access" to rights-of-way "owned or controlled" by utilities. 47 U.S.C. § 224(f). Permitting incumbent LECs to enter into "exclusive" service agreements with building owners would subvert their obligations under section 224 because such agreements would impede competition by allowing the dominant incumbent LECs to "lock-up" many buildings before entrants even have an opportunity to exercise their section 224 rights, prohibit new entrants from exercising their 224 rights and providing service to tenants of multiple tenant environments, and thus would frustrate the very purposes that section 224 was designed to promote.[29]

The same concerns are *not* raised, however, with respect to agreements between building owners and new entrants. The Commission traditionally has "distinguished two kinds of carriers – those with market power (dominant carriers) and those without market power (non-dominant carriers)." *See, e.g.,* Order, *In re Motion of AT&T Corp. to Be*

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[29] It is well-settled that the Commission may regulate the access and use of wiring and rights-of-way that are used to provide interstate services. As the Court of Appeals explained in upholding the Commission's original inside wiring order which required the detariffing and unbundling of inside wiring, "unless there were two separate phone systems with one being used wholly intrastate, unbundled cost-based pricing for a piece of equipment at the federal level necessarily precludes any other result by the states." *NARUC* v. *FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989); *see also Computer and Communications Industry Ass'n* v. *FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (upholding Commission jurisdiction to require the unbundling and detariffing of customer premises equipment), *cert. denied sub nom. Louisiana PSC* v. *FCC*, 461 U.S. 938 (1983). The fact that the inside wiring and right-of-way at issue are physically intrastate is of no consequence. Because "almost all telecommunications facilities are physically intrastate," to interpret section 2(b) to divest the Commission of "jurisdiction over all physically intrastate facilities . . . would render the rest of the Communications Act a nullity." *NARUC* v. *FCC*, 746 F.2d 1492, 1499-500 (D.C. Cir. 1984); *accord NCUC* v. *FCC*, 537 F.2d 787, 794 (4th Cir. 1976).

Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271, ¶ 4 (1995) ("*AT&T Non-Dominance Order*"); *see also id.*, ¶¶ 12-13 (explaining differences between regulation of dominant vs. non-dominant carrier); *cf.* 47 U.S.C. § 224(a)(5) (excluding "incumbent local exchange carrier[s]" from definition and benefits afforded to "telecommunications carrier[s]"). Non-dominant carriers are subject to reduced levels of regulation because the Commission has concluded that they "c[an] not charge rates or engage in practices that contravene the requirements of the Communications Act of 1934 . . . since affected customers always had the option of taking service from a dominant carrier." *AT&T Non-Dominance Order*, ¶ 4. Conversely, the "rates, terms and conditions for interstate service" provided by dominant carriers, such as incumbent LECs, "remain[] subject to close scrutiny." *Id.* In this regard, exclusive contracts entered into between non-dominant carriers and building owners and managers presumptively are not unreasonable or unjust – and therefore do not mandate the same regulatory treatment – because the building owners entering into such agreements have chosen the new entrant rather than exercise the "option of taking service from a dominant carrier." *Id.*

The Commission also should prevent incumbent LECs from enforcing *existing* exclusive service arrangements between building owners and incumbent LECs. It is settled that "the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest." *Western Union Telegraph Co.* v. *FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) (construing 47 U.S.C. §§ 202, 205). Indeed, the Commission previously has exercised that authority to permit customers to "terminate" their "service arrangements" with a carrier "without being contractually liable for such

termination."[30] As the Commission has explained, the overriding benefit of this approach is that it makes "it easier for an incumbent provider's established customers to consider taking service from a new entrant." Memorandum Opinion and Order, *Expanded Interconnection with Local Telephone Company Facilities)*, 9 FCC Rcd. 5154, ¶ 197 (1994) ("*Expanded Interconnection Order*").

Here, prohibiting incumbent LECs from enforcing existing exclusive arrangements is necessary to promote facilities-based competition between incumbent LECs and new entrants in multiple tenant environments. Existing exclusive agreements secured by incumbent LECs would "prevent customers from obtaining the benefits of the new, more competitive access environment" exemplified by the "nondiscriminatory access" regime mandated by section 224(f). *See id.* ¶ 197; *1991 Interexchange Marketplace Order*, ¶ 151 (adopting measures to ensure that customers can "tak[e] advantage of 800 number portability when it arrives"). Accordingly, if local competition is to thrive in multiple tenant environments, building owners must be permitted to terminate their exclusive contracts with incumbent LECs and to seek new relationships with competing carriers.[31]

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[30] Memorandum Opinion & Order On Reconsideration, *Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd. 4421, ¶ 5 n.15 (1995) ("*1995 Interexchange Marketplace Order*"); *see also* Report & Order, *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd. 5880, ¶ 151 (1991) ("*1991 Interexchange Marketplace Order*").

[31] States that have preempted Commission regulation of access to utility rights-of-way already have prohibited exclusive contracts. For example, the California Public Utility Commission ("PUC") recently "prohibit[ed] all carriers from entering into any kind of arrangement or sign any contract with building owners that result[s] in exclusive or discriminatory access." Order Instituting Rulemaking on the Commission's own Motion into Competition for Local Exchange Service, No. 98-10-058, *et al.*, 1998 Cal. PUC LEXIS 879, at *160 (Oct. 22, 1998). The California PUC further created a mechanism to

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There is no basis, however, for abrogating exclusive contracts between building owners and multichannel video programming distributors ("MVPDs"). MVPDs are not subject to regulation under Section 201, and no other statutory section authorizes the Commission to abrogate MVPD-MDU owner exclusive contracts. *See* TCI Reply Comments at 1-20, CS Docket No. 95-184, MM Docket No. 92-260, (filed Mar. 2, 1998). As its own precedent demonstrates, the Commission generally only has authority to abrogate contracts when it seeks to correct unreasonable common carrier rates that violate sections 201 through 205 of the Communications Act.[32] In fact, the Commission recently affirmed the statutory restraints on its ability to allow contractual abrogation outside of these limited contexts. In its *Universal Service Proceeding*, the Commission declined to adopt a requirement that would have obligated carriers with existing service contracts with schools and libraries to participate in a competitive bidding process. As the Commission recognized, it lacks authority to impose such a requirement because "there is

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determine whether an existing agreement is "unfairly discriminatory with respect to other carriers," and, if so, the carrier must "renegotiate[]" the agreement or pay a "fine" of "$500 to $20,000" for "everyday that the agreement or arrangement is in effect." *Id.* *160-*61.

[32] *See, e.g., Local Competition Order*, ¶ 1094 (allowing abrogation of certain interconnection contracts between incumbent LECs and commercial mobile radio service ("CMRS") because the contracts violated the Commission's rate rules, and therefore allowing CMRS providers to revise such contracts in order to implement the mutual compensation rules required by the 1996 Act); Report and Order and Notice of Proposed Rulemaking, *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd. 7369, ¶¶ 199-203 (1992) (allowing contract abrogation by customers bound by long-term contracts in order to enforce the Commission's prescribed termination rates); Memorandum Opinion and Order on Reconsideration, *Competition in the Interstate Interexchange Marketplace*, 7 FCC Rcd. 2677, ¶¶ 22-28 (1992) (allowing abrogation of any contracts that violated Commission rules by bundling 800 services with interexchange offerings).

no suggestion in the statute or the legislative history that Congress anticipated abrogation of existing contracts in this context." *See* Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, ¶ 547 (1997).

Moreover, as both Congress and the Commission have noted, competition by MVPDs for access to multiple tenant environment dwelling units is highly-developed and fierce even with the presence of existing exclusive contracts. *See, e.g.*, 1996 Act § 301(b)(2) (codified at 47 U.S.C. § 543(d)); H. Rep. No. 204, 104th Cong., 1st Sess. 109 (1995) (eliminating uniform rate structure requirement in MDUs because cable operators need greater pricing flexibility due to the competitive presence of other MVPDs offering the same service); Third Order on Reconsideration, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Buy-Through Prohibition*, 9 FCC Rcd. 4316, ¶ 20 (1994) (noting that competitors in the multi-dwelling unit market have become "important footholds for the establishment of competition to incumbent cable systems"); Fourth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd. 1034, ¶ 129 (1998) (noting that the "MDU market . . . is more competitive than other MVPD markets.").

V. THE COMMISSION SHOULD CLARIFY THAT UTILITIES MUST, WHERE NECESSARY, NEGOTIATE MODIFICATIONS TO THEIR RIGHTS-OF-WAY AGREEMENTS WITH BUILDING OWNERS SO AS TO ENABLE THE UTILITIES TO COMPLY WITH THEIR SECTION 224 ACCESS OBLIGATIONS.

The *Notice* seeks comment regarding whether the Commission should impose nondiscriminatory access requirements directly on multiple tenant environment building owners. *Notice*, ¶ 53. Such a requirement undoubtedly would be good policy. Regardless of whether the Commission adopts such a requirement, however, it should

clarify that when a utility's existing arrangement with a building owner purports to prohibit the utility from providing third parties with building access, the utility must negotiate a modification to its contractual or other arrangements with the building owner, or, where necessary, exercise its eminent domain power, so as to enable the utility to provide nondiscriminatory building access to new entrants.

A utility's obligation to modify its existing right-of-way agreements with multi-unit building owners where necessary to enable the utility to provide new entrants with access to the multiple tenant environment through the utility's existing conduits or other easements follows by necessity from the utility's primary nondiscrimination obligation. Section 224(f) is entitled "Non-discriminatory access," and, as noted, it expressly mandates that every "utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). In order to ensure that the required access be truly nondiscriminatory, Congress further provided that a "utility shall apportion the cost of providing usable space among all entities [that use the space] according to the percentage of usable space required for each entity," 47 U.S.C. § 224(e)(3), and required that "a utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section." 47 U.S.C. § 224(g). Finally, Congress specified that where a right-of-way must be modified to provide new entrants with access, each new entrant "shall

bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible." 47 U.S.C. § 224(h).

Together, these provisions make manifest congressional intent that new entrants obtain full use of a utility's rights-of-way under the same terms and conditions, and same costs, as the utility itself, and that a utility be prohibited from evading its access obligations by refusing to undertake any modifications to its poles, ducts, conduits or rights-of-way that might be necessary to enable the utility to provide access to new entrants. Consistent with these statutory provisions, the Commission held in the *Local Competition Order* that a utility "may not favor itself over other parties" when providing access to providers of "telecommunications or video programming," and that the rates and other terms that a utility charges for access must be in proportion to the costs it imputes to itself. *Local Competition Order*, ¶ 1157. Indeed, applying these principles the Commission specifically held that because a "utility is able to take steps necessary to expand capacity if its own needs require such expansion," the "principle of nondiscrimination established by section 224(f)(1) requires that it do likewise for [competing] telecommunications carriers and cable operators," *id.*, ¶ 1162, including, where necessary, exercising its "powers of eminent domain to establish new rights-of-way for the benefit of third parties," or "to expand an existing right-of-way over private property in order to accommodate a request for access," *id.*, ¶ 1181.

Under these principles a utility's obligation to provide access to rights-of-way "over private property," including through multi-unit premises, should be clear. Where a utility's existing poles, ducts, conduits, or rights-of-way permit the utility to provide access to new entrants, the utility must of course do so, and would be prohibited

prospectively from either procuring or accepting right-of-way agreements with building owners that would purport to grant the utility exclusive rights to the rights-of-way or conduit and thereby preclude the utility from providing nondiscriminatory access to such right-of-way under section 224(f).

The same principle applies to existing rights-of-way agreements which are claimed to preclude new entrant access. As established above, the Commission has already held that where nondiscriminatory access can be provided only if the utility makes certain feasible modifications to its right-of-way, the utility must make those modifications.[33] Accordingly, if in a particular instance an incumbent LEC or other utility has entered into a contractual or other arrangement that precludes it from providing a telecommunications carrier or cable provider with the same quality of access to its right-of-way that the incumbent itself enjoys, it is the incumbent LEC's obligation either to exercise its eminent domain powers or to renegotiate that arrangement so that it may comply with its statutory obligations. Neither an incumbent LEC nor any other utility may contract away its federal law duties.

Reflecting these very principles, the Commission, in its *Infrastructure Sharing Order,*[34] expressly held that an incumbent LEC is required to modify any existing contractual or other arrangements with third parties where such modification is necessary to enable the incumbent LEC to comply with nondiscriminatory access obligations. *Infrastructure Sharing Order,* ¶¶ 69-70. Section 259 requires incumbent LECs "to make

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[33] *See Local Competition Order*, ¶¶ 1157, 1181.

[34] Report and Order, *Implementation Of Infrastructure Sharing Provisions In The Telecommunications Act Of 1996*, 12 FCC Rcd. 5470 (1997) ("*Infrastructure Sharing Order*").

available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services." 47 U.S.C. § 259(a). Incumbent LECs argued in that proceeding that "because incumbent LECs' networks are built upon licenses to use intellectual property, 'the sharing of any intellectual property must be conditioned upon the qualifying carrier obtaining a sufficient license from parties that have a protectable interest in such property,'" because those licenses purportedly did not permit incumbents to provide access to third parties.[35]

The Commission squarely rejected that claim, reaffirming its prior tentative conclusion: "whenever it is 'the only means to gain access to facilities or functions subject to sharing requirements,' section 259 requires the providing LEC to seek, to obtain, and to provide necessary licensing, subject to reimbursement."[36] As the Commission explained:

> [W]e agree with AT&T and RTC that providing incumbent LECs may not evade their section 259 obligations merely because their arrangements with third party providers of information and other types of intellectual property do not contemplate – or allow – provision of certain types of information to qualifying carriers. Therefore, we decide that the providing incumbent LEC must determine an appropriate way to negotiate and implement section 259 agreements with qualifying carriers, *i.e.*, without imposing inappropriate burdens on qualifying carriers. *In cases where the only means available is including the qualifying carrier in a licensing arrangement, the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly.* We emphasize that our decision is not directed at third party providers of information but at providing incumbent LECs. We merely require the

[35] *See Infrastructure Sharing Order*, ¶ 63 (citation omitted).

[36] *See id.*, ¶ 69 (citation).

> providing incumbent LEC to do what is necessary to ensure that the qualifying carrier effectively receives the benefits to which it is entitled under section 259.[37]

This would not significantly burden utilities on a going-forward basis. Utilities simply would have to ensure that the access rights they obtain from building owners are not exclusive, and that other utilities will be able to obtain equivalent building access, where possible, under section 224. In addition, to the extent that capacity limitations constrain the number of competitors that feasibly can obtain access to a building, that concern is addressed by the Commission's current rules, which require utilities to take "all *reasonable* steps to accommodate requests for access," including "explor[ing] potential accommodations in good faith with the party seeking access." *Local Competition Order*, ¶ 1163 (emphasis added).[38]

In short, the Commission should make clear that the obligation to provide nondiscriminatory access to poles, ducts, conduits or rights-of-way requires that a utility

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[37] *See Infrastructure Sharing Order*, ¶ 70 (emphasis added). Any requirement that new entrants be required to obtain their own right-of-way from building owners would ensure the very discrimination that the 1996 Act was designed to prevent. For obvious reasons, new entrants do not have the same bargaining power with multi-unit premises owners that the incumbent LECs did when they secured their own easements and right-of-way. At the time the incumbents obtained access for their own wiring, they were the only available providers of local exchange service, and a building owner who denied access to the incumbent would thus deprive each individual premises owner within the multiple tenant environment of access to such service. Indeed, in many instances state law *required* the building owner to provide access to the incumbent LEC. By contrast, new entrants do not have nearly the same leverage when negotiating their own right-of-way, and, as the record already shows, will be (and have been) therefore subject to extortionate demands from building owners for access.

[38] *See also* 47 U.S.C. § 224(f)(2)("a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes").

modify any of its right-of-way arrangements that may be necessary to enable it to provide such access (or exercise any eminent domain powers it may have to do so).

VI. THE COMMISSION SHOULD ADOPT A SINGLE DEMARCATION POINT FOR ALL MULTIPLE TENANT ENVIRONMENTS.

As the Commission correctly observes in its *Notice*, "[i]n order to reach individual units, competing carriers typically need access either to the existing riser cable and inside wiring, or to riser conduit and other building space in which to place their own facilities, or both." *Notice*, ¶ 34. At the same time, "both building owners and incumbent LECs have obstructed competing telecommunications carriers from obtaining access on reasonable and nondiscriminatory terms to necessary facilities located within multiple unit premises." *Id.* ¶ 31. The current Commission rule governing multi-tenant demarcation places far too much discretion in the hands of incumbent LECs.

The Commission's existing demarcation rule for multi-unit installations distinguishes between "premises existing as of August 13, 1990" and "multiunit premises in which wiring is installed after August 13, 1990, including major additions or rearrangements of wiring existing prior to that date." 47 C.F.R. § 68.3(b)(1) & (2). For post-1990 installations, the demarcation point may be established by the telephone company at the minimum point of entry. If the telephone company does not establish the demarcation point at the minimum point of entry, then the "multiunit premises owner shall determine the location of the demarcation point or points." For "premises existing as of August 13, 1990," the "demarcation point shall be determined in accordance with the local carrier's reasonable and non-discriminatory standard operating practices," with the proviso that where the telephone company chooses to adopt subscriber-specific demarcation points, "a demarcation point for a customer shall not be further inside the

customer's premises than a point twelve inches from where the wiring enters the customer's premises, or as close thereto as practicable." *Id.* The minimum point of entry is in turn defined as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings. The telephone company's reasonable and nondiscriminatory standard operating practices shall determine which shall apply." 47 C.F.R. § 68.3.

Under this framework, incumbents frequently have employed "standard operating practices" designed to frustrate competition and to make interconnection and other entry strategies as costly and difficult as possible. In other circumstances, the discretion that the current rule affords building owners can be abused inappropriately. To combat these anticompetitive practices, the Commission should establish a single telephony demarcation point for multi-tenant environments.

VII. THE COMMISSION SHOULD ADOPT RULES PREEMPTING RESTRICTIONS ON FIXED WIRELESS ANTENNAS.

The Commission seeks comment on whether it should adopt rules preempting restrictions on fixed wireless antennas similar to the rules adopted under section 207 for over-the-air reception devices ("the OTARD rules").[39] AT&T supports the adoption of such rules, which would prohibit any state or local law or regulation, private covenant, contract provision, lease provision, homeowners' association rule, or similar restriction that would impair the installation, maintenance, or use of antennas to transmit or receive fixed wireless signals on property within the exclusive control of the antenna user, where the user has a direct or indirect ownership or leasehold interest in the property.

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[39] *Notice*, ¶ 69 (referencing 47 C.F.R. § 1.4000).

Like the OTARD rules, the fixed wireless antenna rules should provide that a restriction "impairs" the installation, maintenance, or use of a fixed wireless antenna if it imposes an unreasonable delay or unreasonable expense on the user of the antenna or precludes reception of an acceptable quality signal.[40] The Commission could include an exception to the rule – like that in the OTARD rules – for restrictions that are necessitated by safety or historic preservation concerns, but the exception should apply only if the restriction in question is as narrowly tailored as possible, imposes as little burden as possible, and applies in a nondiscriminatory manner throughout the regulated area.[41]

The Commission has the authority to adopt such rules under section 4(i) and other provisions of the Communications Act that grant the Commission authority to effectuate the provisions and purposes of the Communications Act. The Commission also has authority to preempt state and local laws and regulations that are obstacles to achieving the objectives of federal law.[42]

A clear objective of Congress in enacting the 1996 Act was to promote competition in the local exchange telecommunications market and break the incumbent

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[40] *See* 47 C.F.R. § 1.4000(a).

[41] *See* 47 C.F.R. § 1.4000(b).

[42] *See* 47 U.S.C. § 253(d); *see also AT&T Corp.* v. *Iowa Utilities Bd.*, 119 S. Ct. 721, 748 (1999) (Section 253(d) "permit[s] the FCC to pre-empt, after notice and comment, any state legal requirement that has the effect of prohibiting entry into local service") (Breyer, J., concurring in part and dissenting in part); Notice of Proposed Rulemaking, *Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations*, 100 F.C.C. 2d 846, ¶ 9 (1985) ("Federal preemptive power may be exercised when . . . state regulation stands as an obstacle to the accomplishment of congressional purpose") (citing *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *Michigan Canners and Freezers Ass'n, Inc.* v. *Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461 (1984); *Florida Avocado Growers* v. *Paul*, 373 U.S. 132 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941)).

LEC monopoly over the provision of local telecommunications services.[43] Fixed wireless services have the potential to provide telecommunications services of a quality equivalent to those provided over wireline telecommunications networks, while wholly bypassing the incumbent LECs' local networks. If the Commission protects the ability of fixed wireless service providers to place small antennas outside subscribers' homes, offices, or apartments, it will speed the deployment of fixed wireless services and thus the growth of competition in the local exchange telecommunications market. Because any restriction that impairs the installation, maintenance, or use of a fixed wireless antenna would obstruct the federal objective of ensuring that all consumers have access to competitive, high-quality, local telecommunications services, the Commission can and should preempt such restrictions.[44]

Section 332(c)(7), which preserves the authority of state and local governments over decisions regarding the placement, construction, and modification of facilities for

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[43] *See* H.R. Rep. No. 104-204, at 48 (1995) (main component of the bill "promotes competition in the market for local telephone service"); S. Rep. No. 104-23, at 5 (1995) (legislation "reforms the regulatory process to allow competition for local telephone services by cable, wireless, long distance" and other entities); *see also* 47 U.S.C. §§ 251-252 (imposing interconnection, unbundling and resale obligations on incumbent LEC's as a means of opening their local service markets to competition); 47 U.S.C. § 271 (permitting Bell Operating Companies to enter the in-region long distance services market only when sufficient competition exists in the local exchange market).

[44] *See* Report and Order, *Preemption of Local Zoning or Regulation of Receive-Only Satellite Earth Stations*, 59 Rad. Reg. 2d (P & F) 1073, ¶ 26 (1986) (finding individuals have right of access under section 705 to interstate communications delivered via satellite and Commission may preempt discriminatory or excessive state and local regulation of satellite antennas because "such regulation[] would frustrate our competitive regulatory policies which have been promulgated to provide for a variety of services by consumers").

personal wireless services,[45] is not an obstacle to the Commission's preemption of state and local regulations that impair the installation, maintenance, or use of a fixed wireless antenna. State and local governments will continue to have the authority to adopt legitimate regulations governing the placement, construction, and modification of fixed wireless antennas, as long as such regulations do not "impair" their installation, maintenance, or use.[46]

Even before section 207 was added by the 1996 Act, the Commission adopted a rule that preempted certain types of non-federal regulation of satellite antennas.[47] The Commission explained that the Communications Act mandates that the Commission ensure consumer access to "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges,"[48] and "where local regulations are found to be undue obstacles to such access, the Commission

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[45] *See* 47 U.S.C. § 332(c)(7).

[46] For example, under the OTARD rules, the Commission has found that many requirements are not preempted, including requirements to paint an antenna to blend in with the background, requirements to place antennas in a rear yard, and where antennas can be viewed from the street or adjoining properties, requirements that they be screened with shrubbery. AT&T plans to install small antennas that blend with the local architecture and are not offensive to the local community. Further, when working with building owners who are concerned about the aesthetics of fixed wireless antennas, AT&T is willing, on a case-by-case basis, to work with the building owners to develop guidelines for antenna placement that address those concerns.

[47] 47 C.F.R. § 25.104. Section 25.104 continues to govern restrictions on the installation, maintenance, and use of satellite earth station antennas greater than one meter in diameter.

[48] 47 U.S.C. § 151.

is required to by the Communications Act to protect this important federal interest."[49] The Commission therefore adopted a "limited preemption which would protect the federal interest in assuring access to interstate satellit[e]-delivered signals while in turn would allow local governments reasonable flexibility in administering zoning plans."[50]

Moreover, section 332(c)(7)(B) expressly prohibits state and local governments from enacting laws or regulations that have the effect of prohibiting the provision of personal wireless services.[51] In applying section 253(a), which tracks the language of section 332(c)(7)(B)(ii), the Commission considers "whether the requirement in question materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[52] Thus, any state or local law that impairs the maintenance, installation, or use of a fixed wireless antenna would violate the proscription on state and local actions that prohibit or have the effect of prohibiting the provision of personal wireless service.

Nor would the Commission's adoption of rules preempting restrictions on fixed wireless antennas constitute an unconstitutional taking. When the Commission amended

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[49] Order, *Petition of City of Rockford, Illinois for a Waiver of 47 C.F.R. § 25.104 Regarding Preemption of Local Regulation of Satellite Earth Stations*, 13 Communications Reg. (P & F) 163, ¶ 2 (1998).

[50] Order, *Preemption of Local Zoning or Other Regulations of Receive-Only Satellite Earth Stations*, 2 FCC Rcd. 202, ¶ 3 (1987).

[51] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[52] Memorandum Opinion and Order, *Petition Of Pittencrieff Communications, Inc. For Declaratory Ruling Regarding Preemption Of The Texas Public Utility Regulatory Act Of 1995*, 13 FCC Rcd. 1735, ¶ 32 (1997); *see also* Memorandum Opinion and Order, *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, 12 FCC Rcd. 14191, ¶ 31 (1997).

its OTARD rules in 1998 to prohibit restrictions on OTARD devices on rental property, it analyzed whether such a rule would violate the "takings" clause of the Fifth Amendment and concluded that it would be neither a per se nor a regulatory taking.[53] A similar analysis produces the same result here.

First, preempting restrictions on fixed wireless antennas on rental property would not be a per se taking, because the landlord already has invited the tenant to physically occupy and possess the property. In the *OTARD Second Report and Order*, the Commission explained that there are three rights that are destroyed by an uninvited permanent physical occupation of the property: the rights to "possess, use, and dispose of" property.[54] The Commission noted that none of these three property rights would be compromised by extending the prohibition on restrictions on OTARD devices to rental property, because the building owner voluntarily relinquished the first two rights (possessing and using) and is free to retain the third right (disposing of the property).[55] Likewise, none of these property rights would be affected by preempting restrictions on fixed wireless antennas where the property is within the exclusive control of the antenna user and the user has a direct or indirect ownership or leasehold interest in the property.

Because the OTARD rules did not require the occupation of the building owner's property by a third party, the Commission explained that their effect on a landlord-tenant

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[53] Second Report and Order, *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, 13 FCC Rcd. 23874 (1998) ("*OTARD Second Report and Order*").

[54] *OTARD Second Report and Order*, ¶ 19 (citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

[55] *OTARD Second Report and Order*, ¶ 19.

relationship should be analyzed under the *Penn Central*[56] regulatory takings standard, rather than a per se takings analysis.[57] Likewise, the preemption of restrictions on fixed wireless antennas should be analyzed using the factors set forth in *Penn Central.*

When the Commission analyzed the OTARD preemption rules under *Penn Central*, it concluded that there was no impermissible regulatory taking. First, the action in question (*i.e.*, expanding the Commission's OTARD rules to include leased property) promoted the substantial governmental interest of bringing choice and competition in the video programming marketplace to an additional segment of the population. The Commission also concluded that there was no evidence that the economic impact on property owners would be significant, because of the building owners' continued ability to use their property to generate rental income, or that expanding its OTARD rules would interfere with reasonable investment-backed expectations.

Applying the same analysis to fixed wireless antennas, there is no reason to reach a different conclusion. As set forth above, preempting restrictions on fixed wireless antennas will promote the substantial governmental interest of promoting choice and competition in the local exchange telecommunications market. And preempting restrictions on fixed wireless antennas will not deprive property owners of "all

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[56] *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978) ("*Penn Central*").

[57] OTARD Second Report & Order, ¶ 20 (citing *Loretto*, 458 U.S. at 440). Under *Penn Central*, a court will determine whether a regulatory taking has occurred by examining the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. *Penn Central*, 438 U.S. at 124; *see also FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252 (1987) (explaining that the right to assert a per se taking is easily lost; once a property owner voluntarily consents to a physical occupation of its property by third party, any government regulation affecting terms and conditions of that occupation is no longer subject to bright-line per se test, but rather the multi-factor inquiry used for non-possessory government activity).

economically beneficial or productive use" of their property,[58] or harm their reasonable investment-backed expectations.[59] Accordingly, adopting similar rules that preempt restrictions on fixed wireless antennas on leased property under the exclusive use or control of the antenna user does not constitute an impermissible taking of private property.

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[58] *Lucas* v. *South Carolina Coastal Council*, 503 U.S. 1003, 1015 (1992). In the *OTARD Second Report and Order* (¶ 25 & n.62), the Commission found that property owners had not shown that extending the OTARD rules would deprive the owners of more than 50 percent of the economically viable use of their property.

[59] There is nothing to suggest that at the time building owners purchased their respective properties they expected to derive income from restricting the local telephone service options of their tenants. *See id.* ¶¶ 25-26 (citing *Multi-Channel TV Cable Co.* v. *Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1123-24 (4th Cir. 1995)).

CONCLUSION

For the foregoing reasons, the Commission should adopt the vast majority of tentative conclusions in the *Notice* and should modify others in accordance with these comments. The Commission also should adopt the additional proposals and recommendations made herein.

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Certificate of Service

I, Cassandra M. de Souza, do hereby certify that I caused one copy of the foregoing Comments of AT&T Corp. to be served by hand delivery on all parties on the attached service list, this 27th day of August, 1999.

/s/ Cassandra M. de Souza
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